

**Iowa Department of Natural Resources  
Environmental Protection Commission**

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**ITEM**

**22**

**DECISION**

**TOPIC**

**Final Rule - Uniform Environmental Covenants**

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The Commission approved a Notice of Intended Action (NOIA) in February, 2006 seeking public comment on these proposed rules. The NOIA was published on March 15, 2006 in the Iowa Administrative Bulletin. One public hearing was held in Des Moines and written comment was solicited.

The Department is recommending the Commission adopt the rules as proposed in the NOIA without revisions. The preamble and final rule is attached.

Wayne Gieselman, Administrator  
Environmental Protection Division

June, 2006

## ENVIRONMENTAL PROTECTION COMMISSION[567]

### Adopted and Filed

Pursuant to the authority of Iowa Code sections 455B.474 and 455H.105, the Environmental Protection Commission (Commission) adopts new Chapter 13, “Environmental Covenants,” and amends Chapter 135, “Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks,” and Chapter 137, “Iowa Land Recycling Program and Response Action Standards,” Iowa Administrative Code.

These amendments implement provisions of 2005 Iowa Acts, Senate File 375, which amended sections of Iowa Code chapters 455B and 455H (codified in 2005 Iowa Code Supplement) and which created new Iowa Code Supplement chapter 455I entitled “Uniform Environmental Covenants Act.” 2005 Iowa Acts, Senate File 375, established a new real estate instrument called an “environmental covenant,” which may be used by owners of property, responsible parties and other interested parties, the Department and other state and federal regulatory agencies as a type of institutional control for the purpose of restricting land use activities and managing the risk of future exposure to existing contaminant conditions.

Iowa Code Supplement section 455B.474(1)“f”(4) authorizes the Commission to adopt rules regarding the application of institutional controls and specifically the use of environmental covenants created in accordance with Iowa Code Supplement chapter 455I as part of a Department–approved corrective action plan at leaking underground storage tank (LUST) sites regulated under Commission rules in Chapter 135. Iowa Code Supplement section 455H.206 authorizes the use of environmental covenants created in accordance with Iowa Code Supplement chapter 455I as one form of institutional control to satisfy remedial standards under the Land Recycling Program (LRP) established in Iowa Code Supplement chapter 455H and implemented by Commission rules in Chapter 137. Iowa Code Supplement section 455B.103 grants the Director of the Department broad discretion to enter into environmental covenants and to accept and maintain other types of real property interests.

Notice of Intended Action for these amendments was published in the March 15, 2006, Iowa Administrative Bulletin as **ARC 4983B**. The Department held a public meeting in Des Moines on April 5, 2006 and written comments were due by April 7, 2006.

The notice of intended action specifically solicited comments on a number of issues but no comment was received on those matters. The Department received only one written comment as a follow up to an oral presentation at the public hearing. The commentor expressed the view that these rules were not necessary to implement S.F. 375 since the act was self-implementing. The commentor stressed the value in maintaining flexibility for the Department and other parties to negotiate provisions on a case by case basis. The commentor felt the rules might discourage participation in the Department's land recycling program but did not offer any specific examples of proposed rules which were objectionable. The commentor also suggested the Department develop some form of mapping areas subject to an environmental covenant. The other participant in the public meeting limited comment as to the intent of the rules.

The amendments to chapter 135 and 137 were necessary because they were inconsistent with S.F. 375. The Department agrees that much of S.F. 375 is self implementing and one option would have been to establish no policies of general applicability and implement all aspects of document preparation, content, submission and review on a case by case basis. However, the Department deliberately intended to establish some policy which would be of general applicability, such as submission procedures, requirements for supporting documentation, certain mandatory provisions not specified in S. F. 375 and highlight provisions that would be discretionary. Much of the submission and review process and supporting documentation policy comes from the guidance the Department has used in the underground storage tank program for several years without objection. Iowa Code section 17A.3(1)"c" creates a strong legislative preference for implementing policy by rule. Any policy of general applicability constitutes a "rule" as defined in Iowa Code section 17A.2(11). The Department has deliberately written the rules with the objective of maintaining flexibility but also providing the public with model forms which if utilized would streamline the submission, review and approval process. Although not part of this rulemaking, the Department is developing a web-based mapping system which would allow easy access to areas subject to environmental covenants and other types of institutional controls.

The Commission is adopting the amendments as provided in the notice of intended action except for some formatting revisions.

These amendments are intended to implement Iowa Code sections 455B.474 and 455H.105 and Iowa Code Supplement chapter 455I.

The Commission adopted the amendments at its public meeting on June 19, 2006. The rule shall be effective August 28, 2006.

The following amendments are adopted.

ITEM 1. Adopt the following new chapter:

### CHAPTER 13 ENVIRONMENTAL COVENANTS

**567—13.1(455B,455H) Definitions.** The definitions in 2005 Iowa Code Supplement section 455I.2 are incorporated by reference. In addition, as used in the chapter:

“Department” means the Iowa department of natural resources.

“Director” means the director of the Iowa department of natural resources.

“Source site” means the property(ies) on which the source(s) of contamination exists and which extends to or has a causal relationship to the area of concern subject to the terms and conditions of the environmental covenant.

**567—13.2(455B,455H) Environmental covenants.** A person requesting department approval of an environmental covenant is responsible for the preparation and submittal of a draft environmental covenant using a model form(s) and model language developed by the department and submittal of supporting documentation. The department will grant presumptive approval to environmental covenants which conform to department model forms and model language. The parties to the environmental covenant may propose revisions to the model language and model form by clearly noting any proposed revisions and making a written request for consideration and approval. The department recommends that the activity and use limitation language in the environmental covenant conform to model language developed by the department.

**567—13.3(455B,455H) Supporting documentation.** Supporting information and documentation shall be submitted with the proposed environmental covenant. Supporting documentation must be sufficient for the department to determine the legal capacity of all legal and equitable interests in the property, to verify the accuracy of the legal description of the affected property and its relationship to the contaminated area of concern, and to ensure that all

legal and equitable interests necessary to establish a valid and enforceable environmental covenant have been accurately identified. Documentation shall include, but not be limited to:

**13.3(1)** An opinion which is prepared by an attorney and which represents that sufficient research has been conducted to identify all persons with a recorded interest in the affected property and other legal and equitable interests necessary to establish a valid and enforceable covenant free of any competing or subordinate property interests. Persons other than an attorney may submit supporting documentation in accordance with department guidance developed to assist them in conducting property interest research and identification of all legal and equitable interests necessary to establish a valid and enforceable covenant. The department may require on a case-by-case basis that an attorney prepare the covenant and supporting documentation and that an abstract of title be prepared or updated when necessary to identify and confirm all legal and equitable interests necessary to establish a valid and enforceable covenant. Property interests which must be identified include, but are not limited to, fee title and equitable titleholders (i.e., contract sellers and buyers), lessees of the property, and consensual lienholders such as mortgagees.

**13.3(2)** Copy of a current deed, contract for deed, or other property transfer instrument verifying the person(s) or business entity(ies) holding fee and equitable title in the property subject to the covenant. Proof of the legal capacity of other equitable interests and signatories to the covenant must be documented by provision of a copy of the applicable real estate instrument such as a mortgage or other consensual lien instrument.

**13.3(3)** A plat map or other official document which accurately depicts the boundaries of the affected property by legal description and as legally described in the environmental covenant. The map must be adequate to verify the relationship of the legally described property subject to the environmental covenant to (a) the contaminant source(s) areas, (b) the source site(s) subject to regulation such as an underground storage tank site, (c) the contaminated area of concern to which the terms of the environmental covenant are intended to apply, and (d) other adjoining or affected properties.

**567—13.4(455B,455H) Recording and approval.** An environmental covenant shall be recorded as provided in 2005 Iowa Code Supplement section 455I.8. An environmental

covenant shall not be recorded without the approval and written signatures of the director or the director's appointed designee and all designated signatories. Signatures shall not be obtained on an environmental covenant until the environmental covenant and all supporting documentation have been reviewed and approved by the department.

**567—13.5(455B,455H) Mandatory provisions.** The environmental covenant shall contain provisions which adequately address the subject areas designated in 2005 Iowa Code Supplement section 455I.4(1). The language to address these mandatory provisions is contained in the department's model forms but may be revised as provided in rule 567— 13.2(455B, 455H). The environmental covenant and any other accompanying documents shall satisfy the formatting and recording requirements of Iowa law and specifically Iowa Code section 331.606B. All environmental covenants must have a proper signature acknowledgment as provided in Iowa Code sections 9E.14 and 9E.15. In addition to these mandatory provisions, the environmental covenant shall contain provisions that require any signatory to the environmental covenant to notify the department of conditions which would constitute a breach of the activity and use limitations contained in the covenant.

**567—13.6(455B,455H) Optional provisions.** On a case-by-case basis, the department may require additional provisions in the environmental covenant within the subject areas authorized in 2005 Iowa Code Supplement section 455I.4(2) and otherwise within the department's authority. These provisions may include, but are not limited to:

**13.6(1)** A provision which requires a standard disclosure in a groundwater hazard statement in accordance with Iowa Code section 558.69 and department rules in 561—Chapter 9. A standard notice could be required if the department or the grantor determines that the property subject to the covenant constitutes a solid waste disposal site which is potentially hazardous or if hazardous waste exists on the property as provided in Iowa Code section 558.69.

**13.6(2)** A provision which requires notice to the department of any transfer of legal or equitable title in the property, notice of the establishment of a long-term lease, or notice of substantial change in use of the property subject to the environmental covenant. This provision may be added when the department finds the need to monitor compliance with and maintenance

of the activity and use limitations and when the risks to health, safety and the environment warrant a higher degree of oversight.

**13.6(3)** A provision which places affirmative duties on subsequent transferees of equitable or legal title in the property or long-term lessees to inspect, monitor and report on conditions and continued compliance related to the activity and use limitations at the property subject to the environmental covenant. This provision may be added when the department finds the need to monitor compliance with and maintenance of the activity and use limitations and when the risks to health, safety and the environment warrant a higher degree of oversight.

**567—13.7(455B,455H) Modification and termination.** Modification or termination of the environmental covenant shall be in accordance with 2005 Iowa Code Supplement chapter 455I and the terms of the environmental covenant.

**567—13.8(455B,455H) Signatories to the environmental covenant.**

**13.8(1)** Agency. The department will generally not be a “holder” as defined in 2005 Iowa Code Supplement section 455I.2(7) and will generally sign the environmental covenant as an “agency” as defined in 2005 Iowa Code Supplement section 455I.2(2), and without taking an interest in the property as provided in 2005 Iowa Code Supplement section 455I.3(2). However, the Department reserves the right to sign as a holder on a case-by-case basis when it determines that holding an interest in the property is beneficial to satisfying the regulatory objectives of the environmental covenant.

**13.8(2)** Holders. The fee title owner of the affected property is required to sign the environmental covenant in the capacity as a grantor and may be required to sign as a holder/grantee as provided in 2005 Iowa Code Supplement section 455I.2(7) if necessary to establish a valid instrument. A contract buyer holding equitable title is required to sign as a holder. When the grantor of the environmental covenant is not the owner of the source site subject to regulation, or is not the person or entity responsible for conducting corrective action at the source site, the department may require the owner of the source site, a person or entity that is the party responsible for corrective action or the person or entity that has conducted the corrective action at the source site to sign on to the environmental covenant as a holder. The department may require a participant in an enrolled site regulated under 567—Chapter 137 to

sign the environmental covenant as a holder if the participant has an interest in ensuring compliance with the terms of the environmental covenant and particularly if the participant has responsibility for corrective action or has undertaken corrective action at the enrolled site.

**13.8(3)** Subordinated interests. As provided in 2005 Iowa Code Supplement section 455I.3, all equitable or other property interests affected by the environmental covenant must consent to and subordinate their interests to the environmental covenant either by signing it or by signing a separate subordination and consent agreement approved by the department. These interests include, but are not limited to, lessees, mortgagees and other consensual lienholders.

**567—13.9(455B,455H) Notice.** In accordance with 2005 Iowa Code Supplement section 455I.7, persons requesting approval of the environmental covenant shall certify that copies of a recorded environmental covenant have been sent to:

1. Each person signing the environmental covenant.
2. Each person holding a recorded interest in the property subject to the environmental covenant but which is not a signatory.
3. Each person in possession of the property subject to the environmental covenant, including lessees, sublessees, assignees of a lease, and current owners and operators of the business assets on the affected property.
4. Each municipality or other unit of local government in which the property subject to the environmental covenant is located. The department may identify the appropriate official or specific unit of government depending on the applicable activity and use limitations specified in the environmental covenant.
5. Each current owner or operator of the underground storage tank to which the environmental covenant relates.
6. Any other person which the department designates, including an adjoining property owner.

These rules are intended to implement Iowa Code sections 455B.474 and 455H.105 and Iowa Code Supplement chapter 455I.

ITEM 2. Amend paragraph **135.12(8)“a”** by rescinding numbered paragraph **“4”** and adopting in lieu thereof the following **new** numbered paragraph:



4. An environmental covenant as provided in 2005 Iowa Code Supplement section 455B.474(1)“f”(4)(f) and in accordance with the provisions of 2005 Iowa Code Supplement chapter 455I and 567—Chapter 13;

ITEM 3. Amend subrule **137.7(2)** by rescinding paragraph “e” and adopting in lieu thereof the following new paragraph:

e. An environmental covenant established in accordance with 2005 Iowa Code Supplement chapter 455I, 2005 Iowa Code Supplement section 455H.206, and 567—Chapter 13.

ITEM 4. Rescind subrule 137.7(3) and adopt the following new subrule in lieu thereof:

**137.7(3)** Environmental covenants. Participants may submit a draft environmental covenant to the department for review and approval in accordance with 567—Chapter 13.

ITEM 5. Amend subrule 137.7(6) as follows:

**137.7(6)** Enforcement of institutional and technological controls. Institutional and technological controls which have been incorporated into a no further action certificate pursuant to rule 137.10(455H), or have been approved prior to issuance of a no further action certificate, may be enforced in Iowa district court by the department, a political subdivision of this state, the participant or any successor in interest to the participant as provided in Iowa Code Supplement section 455H.206(4). Enforcement of the terms of an environmental covenant shall be in accordance with 2005 Iowa Code Supplement chapter 455I, 567—Chapter 13, and the terms of the environmental covenant.

ITEM 6. Amend subrule 137.7(8) as follows:

**137.7(8)** Modification and termination of institutional and technological controls. A participant or successor in interest to a participant, or an owner of property subject to an institutional or technological control, may seek approval from the department for the removal, discontinuance, modification or termination of an institutional or technological control. The ~~persons~~ person must demonstrate that the control in its present form is no longer required to ensure compliance with applicable standards. The person seeking revision must undertake sufficient risk assessment and provide sufficient assessment data to establish that the applicable compliance standards can be met based on the proposed modification. The department may also determine based on a revised assessment that the applicable controls are no longer effective to

meet compliance standards and may require other response action. The department shall issue an amendment to any previously issued no further action letter specifying the approved modification of the institutional or technological controls. Modification and termination of an environmental covenant shall be consistent with these rules and shall conform with 2005 Iowa Code Supplement chapter 455I and 567—Chapter 13.